IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.491 OF 1983
IN
CHAMBER SUMMONS NO.608 OF 1982
IN
SUIT NO.523 OF 1970

The Board of Trustees of the
Port of Bombay ....Appellant
V/s.
Miss Jyotsna B. Kothari & Ors. ....Respondents

Mr.U.J. Makhija i/b M/s.Mulla & Mulla & C. B. & C. for the Appellant.
Mr.D.H. Mehta with Mr.D.R. Talegaonkar i/b Bhaishankar Kanga & Girdharilal for the Respondents.

CORAM : DR.S. RADHAKRISHNAN & S.J. VAZIFDAR, JJ.
DATED : 27TH MARCH, 2006.

ORAL JUDGMENT : (PER DR.S. RADHAKRISHNAN, J.)

1. Heard the learned counsel for the Appellant and the Respondents.

2. By this Appeal, the Appellant is challenging the order of the learned single Judge refusing to condone 28 days delay in taking out the Chamber Summons for setting aside the abatement and bringing the legal representatives on record.

3. The Appellant had filed the above suit on 6th July, 1970 against the Respondents for recovery of possession of three plots of land admittedly owned by the Appellant admeasuring 2440 sq. mtrs. i.e. more

than half an acre in a prime area of Central Mumbai.

4. Defendant No.2 Navin B. Kothari expired on 11.2.1982. The legal heirs of Defendant No.2 were sought to be brought on record of the suit by the aforesaid Chamber Summons. The Respondents' advocate by a letter dated 12.4.1982 had informed the learned advocate for the Appellant regarding the death of Defendant No.2 and mentioned therein the names of the legal heirs. Ultimately, Chamber Summons No.411 of 1982 was taken out to set aside the abatement as well as to bring the legal representatives on record. The Chamber Summons was allowed to be withdrawn on 6.9.1982 with liberty to take out a fresh Chamber Summons so as to enable the Appellant to implead the legal representatives as parties in the said Chamber Summons.

5. On 16.9.1982 the Chamber Summons wherein the impugned order has been passed viz. Chamber Summons No.608 of 1982 was taken out by the Appellant. The Chamber Summons was made absolute on 4.10.1982 by the learned single Judge wherein the Respondents had appeared and had opposed the same.

6. However, the learned Advocate for the Appellant, due to inadvertence had not impleaded the

legal representatives as parties to the above Chamber Summons, though liberty was granted. Without those legal representatives being parties, the Chamber Summons was made absolute on 4.10.1982. The Appellant having realised that the legal representatives were not made parties in the aforesaid new Chamber Summons No.608 of 1982, moved the learned Judge on 11.10.1982 on which date the learned Judge on the application of the learned advocate for the Appellant recalled the order dated 4.10.1982 whereby the aforesaid Chamber Summons was made absolute and liberty was granted to the Appellant to amend the Chamber Summons by adding the legal representatives as the Respondents. Accordingly it appears that the amendment has been carried out and the said Chamber Summons was heard before the learned single Judge.

7. The learned single Judge by his order dated 21.6.1983 has held that the Appellant had not shown sufficient cause for condoning the delay of 28 days i.e. from 16.9.1982 to 14.10.1982. The aforesaid delay was in impleading the legal representatives as parties to the aforesaid Chamber Summons in pursuance of the leave granted earlier by the Court. The learned single Judge has however made the Chamber Summons absolute as far as the formal prayer of correcting the

address pertaining to Defendant Nos.(1-a), (1-b) and 3, and dismissed the Chamber Summons with regard to setting aside the abatement and to bring the legal representatives on record.

8. Mr.Makhija, the learned advocate for the Appellant pointed out that the Appellant itself after realizing that the legal representatives are not impleaded due to inadvertence in the said Chamber Summons, had in fact moved the Court for recall of the order whereby the aforesaid Chamber Summons was earlier made absolute and sought leave to implead the aforesaid legal representatives. Mr.Makhija contended that the suit is for recovery of possession of half an acre of land in a prime area of the city of Mumbai and in the larger interests of justice, the Appellant's Chamber Summons ought to have been allowed. After having realized that the legal representatives were not made parties to the said Chamber Summons, the said Chamber Summons was withdrawn with liberty to file a fresh Chamber Summons. In fact accordingly the second Chamber Summons had been taken out and again through inadvertence the legal representatives were not made parties.

9. Mr.Makhija contended that in the larger

interest of justice, this Chamber Summons ought to have been granted by the learned single Judge condoning 28 days delay and in that regard he relied upon a judgment of the Supreme Court in *Collector, Land Acquisition, Anantnag and another v. Mst.Katiji and others, AIR 1987 SC 1353*, paragraph 3 whereof reads as under :-

> "3. The legislature has conferred the power to condone delay by enacting Section 51 of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it s realized that:
>
> "1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
>
> 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
>
> 3. "Every day’s delay must be

explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala-fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the "State" which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a step-motherly treatment when the "State" is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in

> charge of the matter is directly hit or hurt by the judgment sought to be subjected to imbued with the note-making, file-pushing and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time-barred, is therefore, set aside. Delay is condoned. And the matter is remitted to the High Court. The High Court will now dispose of the appeal n merits after affording reasonable opportunity of hearing to both the sides.

10. Mr.Makhija also contended that in the aforesaid Chamber Summons No.608 of 1982, when the Appellant realized the mistake of not impleading the legal representatives, orally made an application before the learned single Judge on 11.10.1982 wherein this Court itself recalled the earlier order and granted such liberty by allowing the Appellant to

implead the legal representatives as parties. Accordingly the said amendment was carried out and all the Respondents were duly served and the Chamber Summons came to be heard. The contention of the learned advocate for the Appellant is that in the above matter, the Court should have adopted a justice oriented approach to do substantial justice and ought not to have rejected the Chamber Summons on a technical ground of delay of 28 days.

. Mr.Makhija also pointed out that there is a duty cast on the Respondent under Order 22 Rule 10-A of the Code of Civil Procedure (C.P.C.) to inform the Court about the death of any party and thereupon the Court issues notice with regard to the death. In this behalf, he brought to our notice Order 22 Rule 10-A of the C.P.C. which reads as under :-

> **"10-A. Duty of pleader to communicate to Court death of a party** - Whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist."

11. There is no dispute that in the above matter

the learned advocate for the Respondent till date has not informed this Court about the death of Defendant No.2 - Navin B. Kothari. Perusal of the above provision clearly indicates the duty of the learned advocate to inform the Court about the death and thereupon the Court would give the notice of such death to the other party, which the learned advocate for the Respondent has not even complied with till date. The Supreme Court has considered the provisions of Order 22 Rule 10A in *Gangadhar v. Raj Kumar (1984) 1 SCC 121.* It was held :-

> "5. So to the factual matrix, deceased respondent died on April 19, 1980. Appellants' application for substitution was moved on July 15, 1981. Unquestionably it was beyond the prescribed period of limitation and the appeal had abated. What are the intervening circumstances that may help in determining the question whether appellants were prevented by a sufficient cause in moving the application within the period of limitation. Appellants say that when Raj Kumar moved IA No. 1980 of 1981 for substitution on July 1, 1981, they for the first time came to know that the sole respondent had died on April 19, 1980. The High Court proceeded to examine the truth of their averment and held that at least one of the appellants must have come to know that the sole respondent had died on April 19, 1980. The High Court then referred to Union of India v. Ram Charan (1964) 3 SCR 467 and held that it is for the appellant to show when he

came to know about the death of the deceased respondent, and assign reasons why they did not come to know about it earlier and satisfy the court that they had no means of knowledge and only then the appellants can get benefit of the provision of clause 5 of the Limitation Act. In approaching the matter from that angle the learned Judge failed to take note of an important change in law deliberately made to cater to situation which was in the hand of the learned Judge. Nowhere in the order the learned Judge refers to Rule 10-A of Order XXII. No attempt was made to appreciate what necessitated the introduction of this new provision. Applying the well known test when a new provision is introduced in a statute prescribing procedure as to what was the mischief to remedy which the new provision was introduced in law, Rule 10-A was specifically introduced to meet with the situation in hand.

6. Sole respondent died on April 19, 1980. His adopted son applied for substitution which included intimation to the Court of the death of the respondent as envisaged by Rule 10-A on July 1, 1981, that is, nearly one year and six weeks after the death of his adoptive father and promptly within two weeks appellants moved IA No. 2110 of 1981. And it is not made clear when notice of IA No. 1980 of 1981 moved by the adopted son was served upon the appellants or their learned advocate. The legislative intention of casting a burden on the learned advocate of a party to give intimation of the death of the party represented by him and for this limited purpose to introduce a deeming fiction of the contract being kept subsisting between the learned advocate and the deceased

> party was that the other party may not be taken unawares at the time of hearing of the appeal by springing surprise on it that the respondent is dead and appeal has abated. In order to avoid procedural justice scoring a march the Code of Civil Procedure (Amendment) Act of 1976 which came into force on February 1, 1977. Unfortunately, the learned Judge took no notice of the wholesome provision and fell back on the earlier legal position which automatically stands modified by the new provision and reached an unsustainable conclusion. In fact in a fact situation as the present one, we may preferably refer to Bhagwan Swaroop v. Mool Chand (1983) 2 SCC 132. The view taken in that case would unquestionably show that the High Court was in error in refusing to set aside abatement. We are of the opinion that the earliest knowledge about the death of the deceased respondent can be attributed to the appellants on July 1, 1981 when Raj Kumar applied for substitution. Promptly within two weeks the application for substitution was made by the appellants. Therefore, it is satisfactorily established that the appellants were prevented by a sufficient cause in making the application for substitution within the prescribed period of limitation and the delay deserves to be condoned."

12. In *O.P. Kathpalia v. Lakhmir Singh, (1984) 4 SCC 66,* the Supreme Court held :-

> "30..... Coupled with this is the fact that under Rule 10-A of Order 22 a duty is cast on the pleader appearing for the deceased party to give

> intimation of the same to the opposite party. This duty in this case was discharged on March 2, 1984 that is six years after the death and promptly within three weeks the petition for substitution is filed. Having regard to the cumulative effect of all these facts we are satisfied that the appellant has made out a sufficient case for condoning the delay in seeking substitution. We accordingly set aside abatement of appeal and grant substitution."

. Thus this is at least one of the aspects to be taken into consideration while dealing with an application for setting aside abatement.

13. Mr.Mehta, the learned advocate for the Respondent contended that in the above Appeal, the very first Chamber Summons was taken out on 21st June, 1982 that is to say 40 days delay in taking out the Chamber Summons even though it is mentioned as 28 days by the learned single Judge. Mr.Mehta also contended that the Appellant has been grossly negligent in not bringing on record the legal representatives and there is nothing erroneous or perverse in the order of the learned single Judge declining to condone the delay of 28 days. Mr.Mehta referred to a judgment of the Supreme Court in the case of - *Union of India .v Ram Charan (deceased) through his Legal Representatives, AIR 1964 SC 215,* in support of his contention that

every days delay must be explained. According to him the Appellant had failed to do so.

. Mr.Mehta, took us through the affidavit in support of the Chamber Summons and pointed out that there is nothing explained whatsoever with regard to condoning the aforesaid delay of 28 days and has not even bothered to file any additional affidavit with regard to the same. Mr.Mehta also contended that by virtue of the rights accrued to the Respondents in the present suit by virtue of the abatement it would be unjust to allow the said Chamber Summons.

14. Having regard to the aforesaid facts and circumstances we do not find any willful negligence, inaction or want of bona-fide on the part of the Appellant in prosecuting the above suit or the above application. As noted hereinabove, the Appellant had taken out the aforesaid Chamber Summons on 21.6.1982. However, it appears that through inadvertence of the advocates on more than one occasion, the legal representatives were not mentioned in the said Chamber Summons No.411 of 1982 and finally the Chamber Summons was allowed to be withdrawn on 6.9.1982 with liberty to take out a fresh Chamber Summons which was also taken out by the Appellant and wherein again, the

Appellant had inadvertently not mentioned the names of the legal representatives. This Court by an order dated 11.10.1982 had again permitted the Appellant to carry out the amendment by adding the names of the legal representatives.

15. Having regard to the aforesaid facts and circumstances and especially in the light of the judgment of the Supreme Court in the case of *Collector, Land Acquisition, Anantnag and another v. Mst.Katiji and others, AIR 1987 SC 1353,* to do substantial justice, by refusal to condone the delay, injustice will be caused to the Appellant. By allowing this amendment, ultimately the suit will be decided on merits. Another aspect to be taken into account is the non-compliance of Rule 10A, of Order 22 of Code of Civil Procedure by the learned Advocate for the Respondents. We are strongly of the view as indicated by the Supreme Court that the Court is empowered to remove injustice and do substantial justice especially when there is no willful negligence, inaction or lack of bona-fide on the part of the Appellant. This is a fit case wherein the Chamber Summons ought to have been allowed.

16. Accordingly Appeal is allowed, hence Chamber

Summons No.608 of 1982 is made absolute in terms of prayer clauses (a), (b), (d), (d) and (f). The Amendments to be carried out within a period of eight weeks from today. The Appellant shall pay the costs quantified at Rs.5000/- to the Respondents within a period of eight weeks from today. The payment of costs is a condition precedent.

. This order is stayed for six weeks from today.

(DR.S. RADHAKRISHNAN, J.)

(S.J. VAZIFDAR, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.491 OF 1983
IN
CHAMBER SUMMONS NO.608 OF 1982
IN
SUIT NO.523 OF 1970

DATE OF DECISION : 27TH MARCH, 2006

For Approval and Signature :

HON'BLE MR.JUSTICE DR.S.RADHAKRISHNAN

HON'BLE MR.JUSTICE S.J. VAZIFDAR

1. Whether Reporters of Local Papers may be allowed to see the judgement ?

2. To be referred to the Reporter or not ?